

Supreme Court, U. S.

FILED

MAR 28 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

MARCH TERM, 1977

No. **76-1333**

WILLIAM J. BEER and DORA BEER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FRANCES R. AVADENKA
Counsel for Petitioners
2800 North Woodward
Bloomfield Hills, MI 48013
Phone: (313) 335-9266

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory and Constitutional Provisions	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	14
Appendix	
A. U.S. Tax Court — Opinion August 18, 1975	14
B. Docket Entries — U.S. Tax Court	21
C. U.S. Tax Court Decision: Docket No. 2988-72 September 22, 1975	33
D. U.S. Tax Court Decision: Docket No. 8187-73 September 22, 1975	34
E. U.S. Tax Court Decision: Docket No. 4479-74 September 22, 1975	34
F. U.S. Tax Court Order, November 3, 1975	35
G. U.S. Tax Court Order, November 19, 1975	35
H. U.S. Court of Appeals Order November 22, 1976 .	36
I. U.S. Court of Appeals Order December 28, 1976 ..	37

INDEX OF AUTHORITIES

Cases Cited:	Page
Collector v Day (Buffington v Day), 11 Wall 113; 20 Led 122 (1871)	6,8
Cohen v Virginia, 6 Wheat 264, 399; 5 Led 257, 290 (1821)	11,12
Evans v Gore, 253 US 245; 64 Led 887 (1919)	10
Gordy v Dennis, 5 A 2d 69 (MD 1939)	12
Graves v New York, 306 US 465; 83 Led 927 (1938) .	7,12
Helvering v Gerhardt, 304 US 405; 82 Led 1427 (1937) .	6,7
Miscellaneous Citations:	
The Federalist Papers, Federalist 70, 79	10
Michigan Constitution, Article VI, Section 18	3,8,9
United States Constitution, Article IV, Section 4 ...	3,8,9
United States Constitution, Article II, Section 1	8

IN THE Supreme Court of the United States

MARCH TERM, 1977

— ♦ —
No.

— ♦ —
WILLIAM J. BEER and DORA BEER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

— ♦ — PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT — ♦ —

To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court of the United States:

William J. Beer and Dora Beer, the petitioners herein,
pray that a writ of certiorari issue to review the judgment
of the United States Court of Appeals for the Sixth
Circuit entered in the above-entitled case on December
28, 1976.

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit dismissed petitioners' timely appeal from the Tax Court without hearing or oral arguments. Said order of dismissal is printed in Appendix H hereto, *infra*, page 36. The opinion, Orders of Judgment and the Journal Entries of Judgment of the Tax Court are printed in Appendix A through G hereto, *infra*, pages 14-35.

JURISDICTION

The order of dismissal of the United States Court of Appeals for the Sixth Circuit (Appendix H, *infra*, page 36) was entered on November 22, 1976. A timely petition for rehearing was denied on December 28, 1976, (Appendix I, *infra*, page 37). The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

I. Whether the salary of the Petitioner, William J. Beer, a state court judge, is exempt from the imposition of federal income taxes.

II. Whether the question of a state court judge's immunity from federal income taxation is "frivolous" and "without merit" (See Order of November 22, 1976, Appendix H, *infra*, page 36) so as to warrant summary disposition by the United States Court of Appeals for the Sixth Circuit.

STATUTORY AND CONSTITUTIONAL PROVISIONS

This case concerns Article IV, Section 4 of the United States Constitution, which provides in pertinent part as follows:

"The United States shall guarantee to every state in this union a Republican Form of Government and shall protect each of them against invasion. . ."

This case also concerns Article VI, Section 18 of the Constitution of the State of Michigan, which provides as follows:

"Salaries of justices of the supreme court, of the judges of the court of appeals, of the circuit judges within a circuit and of the probate judges within a county or district, shall be uniform, and may be increased but shall not be decreased during a term of office except and only to the extent of a general salary reduction in all other branches of government."

This case also concerns the responsibility of a United States Court of Appeals to forbear from summary dismissal of a matter which has not been specifically decided by this Court.

STATEMENT OF THE CASE

Petitioners, William J. Beer and Dora Beer, were husband and wife during the years ending December 31, 1969, December 31, 1970, and December 31, 1971. During those years, petitioner William J. Beer was employed as a Michigan Circuit Court Judge.

Circuit Judges in the State of Michigan are subject to reassignment to preside over trials outside of their home circuit, whenever and wherever desired, by the Michigan Supreme Court. Judge Beer has served in many circuits in the State of Michigan presiding over lengthy and difficult trials. He has also served under special assignment in the Detroit Recorder's Court at Detroit, Michigan, and in the Michigan Court of Claims at Lansing, Michigan. Sometimes in Michigan, circuit judges on assignment sit at the appellate court level. Judge Beer has served on assignment on more than one occasion as an appellate judge in the Michigan Court of Appeals. Of particular note, Judge Beer was the trial judge in the case of *Wayne Circuit Judges v Wayne County*. His ruling, under the Separation of Powers Doctrine that the judicial branch of government decides its own needs, was upheld in the Michigan Supreme Court. 386 Mich 1, (1971) 190 N.W.2d 228 (1971); cert den 405 U.S. 923 (1971).

Judge Beer is now in his 18th year on the bench, and his judicial tenure in office does not expire until January, 1981.

Judge Beer was compensated for his judicial services for the year ending December 31, 1969, with payments of \$20,208.25 from the State of Michigan, \$10,000.00 from the County of Oakland, Michigan, and \$120.00 from the County of St. Clair, Michigan, for a total of \$30,328.25. He was compensated for his judicial services for the year ending December 31, 1970, with payments of \$19,999.92 from the State of Michigan, and \$10,000.00 from the County of Oakland, Michigan for a total of \$29,999.92. He was compensated for his judicial services for the year

ending December 31, 1971, with payments of \$21,999.96 from the State of Michigan, and \$30,000.01 from the County of Oakland, Michigan for a total of \$51,999.97.

Petitioners on their joint United States Individual Income Tax Returns for the years ending December 31, 1969, December 31, 1970, and December 31, 1971, did not include in gross income the compensation that Judge Beer received for his judicial services as a Michigan Circuit Court Judge.

The Commissioner of Internal Revenue determined that the compensation Judge Beer received for judicial services was includable in his gross income and mailed to the petitioners a notice of deficiency on February 2, 1972, determining a deficiency in income tax for the year ending December 31, 1969, of \$7,865.02; a notice of deficiency on March 27, 1974, determining a deficiency in income tax for the year ending December 31, 1970, of \$7,185.22; and a notice of deficiency on August 20, 1973, determining a deficiency in income tax for the year ending December 31, 1971, of \$3,854.40. Petitioners in fact had no deficiency for the year 1970. Said tax was fully paid. Notice of deficiency should be determined as wrongfully issued since full payment was made despite the constitutional contentions.

The matters were heard before the Tax Court and Judge Wiles filed his opinion on August 18, 1975, holding that the petitioner William J. Beer's compensation as a state judge was not immune from federal income taxation. The Court of Appeals for the Sixth Circuit dismissed petitioners' appeal without hearing and denied petitioners' timely motion for rehearing.

REASONS FOR GRANTING THE WRIT

1

The narrow substantive issue in this case is whether, where a state constitution prohibits diminution of a state judge's compensation during his term of office, such compensation is immune from federal income taxation.

This precise question of whether the federal government can constitutionally levy an income tax on the compensation of a state judge has been presented to the Supreme Court of the United States only once. In *Collector v Day*, (*Buffington v Day*) 11 Wall 113; 20 Led 122 (1871), a probate judge from Massachusetts brought suit against the collector of internal revenue to recover federal taxes which has been assessed against his judicial compensation. The Court held that the establishment of a judicial branch of government by a state, and the appointment of judges to implement such establishment were among the reserved powers of the state; that is, an *original inherent power never parted with*, and in respect to which the supremacy of the federal government did not exist. The means and instrumentalities employed by a state government to carry into operation the powers reserved to it were held to be improper subjects of the taxing power of Congress.

Since 1871, no other case involving the specific question of federal taxation of a state judge has come before the Supreme Court. In 1937, the Court reaffirmed the *Day* holding in *Helvering v Gerhardt*, 304 US 405; 82 Led 1427 (1937).

In the *Gerhardt* case, the Court was called upon to determine the question as to whether the taxpayers claiming immunity from federal taxation were engaged in an essential governmental function. The taxpayers were

certain employees of a bi-state port authority corporation who failed to convince the Supreme Court of the historical essentiality of their functions. However, the *Gerhardt* court succinctly and explicitly recognized and reaffirmed the immunity from federal taxation of a state judicial officer engaged in the performance of a function which pertained to state governments at the time the Constitution was adopted, without which immunity no state could long preserve its existence. *Helvering v Gerhardt*, *supra*, p 415.

The *Gerhardt* case was argued in April of 1938, and decided in May, 1938. Less than a year later, in March, 1939, the Supreme Court decided *Graves v New York*, 306 US 465; 83 Led 927 (1938). The *Graves* case has since been relied upon and cited as overruling the then just reaffirmed doctrine of immunity of a state judge from federal taxation. However, careful reading of the *Graves* opinion clearly indicates that such is not the case.

Mr. Justice Stone wrote both the *Gerhardt* and the *Graves* opinions, and his reaffirmance of the *Day* principle in the *Gerhardt* opinion has been noted above. Subsequently, the *Gerhardt* decision, to the extent that the facts were analagous, was relied upon in *Graves*.

The *Graves* case actually was the converse of *Gerhardt*; that is, in *Gerhardt* state employees claimed immunity from federal taxation, and in *Graves*, federal employees claimed immunity from state taxation. *In neither case were judges of the respective governments the petitioners.*

In both *Gerhardt* and *Graves* the governments were carrying on activities and enterprises not known to the states when the Constitution was adopted: in the former, a Port Authority Corporation; in the latter, a Home

Owners' Loan Corporation. Therefore, any tax immunity found to exist would of necessity arise by implication from rather than the express intent of the Constitution. This *implied* immunity is the concept which was ultimately rejected in the *Graves* decision.

But, Mr. Justice Stone very carefully limited the parameters of the *Graves* opinion with regard to *Collector v Day, supra*:

"*Collector v Day*, 11 Wall 113, 20 Led 122, and *New York ex rel Rogers v Graves*, 299 US 401, 81 Led 306, *supra*, are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or state government or their instrumentalities." (Emphasis added)

The immunity of state judges from federal income taxation does *not* arise by implication. The purposeful, specialized treatment of judges was *expressly* intended by the framers of the Constitution. Establishment and exclusive control of a state judicial branch of government is historically an *essential* function reserved to the states. *Helvering v Gerhardt, supra*. Furthermore, Article VI, Section 18 of the Michigan Constitution, patterned after Article II, Section 1 of the United States Constitution, *expressly* sets up the constitutional immunity.

This special treatment afforded judges of the state judiciary is constitutionally protected by Article IV, Section 4 of the Constitution of the United States which specifically guarantees to the states the right to establish a republican form of government, the means and instrumentalities of which, under the "reserve" clause of

the 10th Amendment, are completely within the sovereign control of the states. The State of Michigan, pursuant to such reserved powers, and in conjunction with its historical as well as constitutional right to establish an independent judiciary, has seen fit to protect that judiciary by the the enactment of Article VI, Section 18 of its Constitution, which provides as follows:

"Salaries of justices of the supreme court, of the judges of the court of appeals, of the circuit judges within a circuit, and of the probate judges within a county or district, shall be uniform, and may be increased but shall not be decreased during a term of office except and only to the extent of a general salary reduction in all other branches of government."

In light of this constitutional pronouncement, any interference with the compensation received by judges of the State of Michigan is thereby constitutionally forbidden.

Neither the United States Constitution nor the Michigan Constitution contain similar protections for the compensation paid to the legislative or executive officers of the government. As such, it is patently obvious that the judicial compensation is to be treated separately from that paid to members of the other branches of the government.

This special treatment of the judiciary is inexorably ingrained upon our historical fabric. Since the time of our founding fathers it has been recognized that the judicial branch of government, be it federal or state, could maintain its integrity only if it were totally independent of the executive and legislative branches. The colonists were well aware of the evils which would result from an executive or legislature which could use judicial tenure

and judicial compensation to control judicial actions. The problem was so acute that the Declaration of Independence indicted the King for having "made judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

The concern of the framers of the Constitution with the need for special protection of the judicial branch is reflected by Alexander Hamilton in the Federalist Papers. In Federalist No. 70 Hamilton stated:

" . . . the judiciary is beyond comparison the weakest of the three departments of power, . . . it can never attack with success either of the other two; and . . . all possible care is requisite to enable it to defend itself against their attacks."

And in Federalist 79, Hamilton pointed out:

"Next to permanency in office nothing can contribute more to the independence of the judges than a fixed provision for their support . . . In the general course of human nature, the power over a man's subsistence amounts to a power over his will."

This special protective treatment of judges served also to attract highly qualified men to the bench. Chancellor Kent noted:

"The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station." as cited in *Evans v Gore*, 253 US 245; 64 Led 887 (1919)

The objectives of the colonists and framers of constitutions, federal and state, with regard to the independence and quality of their respective judiciaries, are no less viable today than they were two hundred years ago. Yet, the clear intent of the Michigan constitutional protection for its judges has been abrogated by the significant and prolonged lessening of their guaranteed compensation by action of the federal government.

Collector v Day, *supra*, recognized and gave effect to the constitutional principles discussed herein. Since that time, for a period in excess of one hundred years, no other case dealing with the principles discussed herein has been presented to this Court. Notwithstanding this fact, *Graves v New York*, *supra*, has been relied upon as authority for the proposition that the federal government, in complete avoidance and disregard of Article IV, Section 4 of the United States Constitution, can tax the compensation of a state judge who is protected by a state constitution from diminishment of such compensation while he is in office. Chief Justice Marshall, in *Cohen v Virginia*, 6 Wheat 264, 399; 5 Led 257, 290 (1821) warned against just such an overbreadth application of the law of one case to another:

"It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles

which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In this regard it is important to note that the Court in *Graves* gave no consideration to the historical and constitutionally mandated independence of the judiciary in commenting on the *Day* case. Neither did the Court completely investigate the effect of the principle being espoused in *Graves* on the express Constitutional immunity of a state judge from federal taxation. Additionally, as noted previously, the *Graves* case had nothing whatsoever to do with judicial salaries.

The argument has been made that judges should not be insulated from paying their fair share for the cost of government as do other non-judicial citizens, but the exemption of state judicial compensation from diminishment by federal income taxation is not in any true sense a windfall or a gratuity. "It is essentially and primarily compensation based upon valuable consideration . . . The undertaking has its own particular value to the citizens in securing the independence of the judiciary in crises; [and] . . . the members of the judiciary relinquish their position at the bar, with all its professional emoluments, sever their connection with their clients, and dedicate themselves exclusively to the discharge of the onerous duties of their high office." *Gordy v Dennis*, 5 A 2d 69 (Md. 1939). The objective of the framers of the Constitution to attract highly qualified persons to the bench by guaranteeing an undiminished compensation is fast being eroded by the lessening of that compensation by taxation. This Court, in its wisdom, need do little more than enforce the express intent of the Constitution to stop such erosion.

In keeping with this Court's earnest and repeated requests that Petitions for Certiorari be as brief and succinct as possible, full repetition of all of the collateral and related issues raised before the Tax Court and the Court of Appeals have not been fully explored herein. It is respectfully urged that this Court, upon receipt of the complete record, will take into consideration all of the briefs heretofore submitted to each of those tribunals, including the briefs filed in support of the motions for rehearing.

The Circuit Court of Appeals for the Sixth Circuit dismissed petitioners' appeal as being "frivolous" and "without merit." A timely motion for rehearing was also summarily disposed of.

Petitioners' claim is not frivolous. Such a position by the Court of Appeals serves only to trivialize basic concepts which are the cornerstones of the Separation of Powers Doctrine which has repeatedly preserved our republic. This case involves basic constitutional principles and is not merely the attempt of one man to relieve himself of the responsibilities of citizenship. The constitutional prohibition against the diminution of salaries of state judges should be construed now, as it has been historically, as a limitation imposed in the public interest and not as a private grant for the benefit of the members of the judiciary. The petitioner has been a state judge for over eighteen years and daily is called upon to fulfill the often burdensome duties of his office.

Viewed from this premise, the Court of Appeals failed to consider the critically important issue being presented to it for determination. As a constitutional tribunal vested

with the responsibility of reviewing the decisions of lower courts, the Court of Appeals should not arbitrarily, and under the guise of docket control, dispose of an appeal which presents a question heretofore not specifically dealt with since 1871.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Frances R. Avadenka
Counsel for Petitioners
2800 North Woodward Ave.
Bloomfield Hills, MI 48013

APPENDIX A

OPINION — AUGUST 18, 1975

(United States Tax Court)

(Beer et al v. Comm. Internal Revenue)

(Docket Nos. 2988-72, 8187-73, 4479-74)

(Filed August 18, 1975)

64 T. C. No. 83

Held, petitioner, a Michigan state court judge, is not entitled to exclude his salary from income under the United States or Michigan Constitutions.

Joseph F. Dillon, for the petitioners.

James E. Keeton, Jr., for the respondent.

Wiles, Judge: Respondent determined deficiencies in petitioners' income taxes as follows:

Year	Deficiency
1969	\$7,865.02
1970	7,185.22
1971	3,854.40 ¹

After concession of one issue by petitioners, the only issue for decision is whether William J. Beer (hereinafter petitioner) is entitled to exclude his Michigan judicial salary from income under the United States or Michigan Constitutions.

This case was fully stipulated pursuant to Rule 122, Tax Court Rules of Practice and Procedure.

Petitioner and Dora Beer, husband and wife, resided in Berkley, Michigan, when their petitions were filed. Their joint Federal income tax returns for 1969, 1970 and 1971 were filed with the District Director of Internal Revenue, Detroit, Michigan.

¹ Because of a computation error in the Notice of Deficiency for 1971, respondent amended his answer in docket No. 8187-73 to request an increase in deficiency for that year from \$3,854.40 to \$13,616.81; petitioner stipulated that this adjustment was proper.

During 1969, 1970 and 1971, petitioner's compensation as a Michigan Circuit Court Judge was as follows:

Year	State of Michigan	County of Oakland, Michigan	County of St. Clair, Michigan
1969	\$20,208.25	\$10,000.00	\$120.00
1970	19,999.92	10,000.00	—
1971	21,999.96	30,000.01	—

Federal income tax returns filed by petitioner and Dora Beer for 1969, 1970 and 1971 did not include that compensation in gross income, but respondent determined that it was includable in gross income and assessed deficiencies in the amounts specified earlier.

Petitioner contends that his Michigan Circuit Court Judge salary is immune from Federal taxation under both the United States and Michigan Constitutions. Although we sympathize with his position, it is now well settled that there is no constitutional objection to Federal taxation of the salaries of state officers or employees. *Graves v New York*, 306 U.S. 466 (1939); *Helvering v Gerhardt*, 304 U.S. 405 (1938); *Matthew H. Murphy*, 46 B.T.A. 1058, 1062 (1942); *Ira H. Lohman*, 45 B.T.A. 495, 503 (1941), *affd.* 133 F. 2d 977 (8th Cir. 1943).

The petitioners cite for support Article III, Section 1 of the United States Constitution, which provides as follows:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and

in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Petitioner contends that this provision prohibits diminution of his salary by Federal income taxes. Michigan Circuit Courts, however, are clearly not "inferior Courts as the Congress may * * * establish" within the intendment of Article III. Cf. *O'Donoghue v United States*, 289 U.S. 516 (1933); *Charles F. Parsons*, 42 B.T.A. 1114, 1117 (1940). And even if Article III, Section 1 were applicable, imposition of Federal income taxes upon a judge of a court created thereunder does not constitute diminution of his salary within the meaning of that provision. *OMalley v Woodrough*, 307 U.S. 277 (1939); *William E. Baker*, 4 T.C. 307, 310 (1944), *affd.* 149 F. 2d 342 (4th Cir. 1945).

Petitioner also contends that Federal taxation of his salary would contravene Article VI, Section 18 of the Michigan Constitution, which provides, in part, as follows:

Salaries * * * of the circuit judges within a circuit * * * shall be uniform, and may be increased but shall not be decreased during a term of office except and only to the extent of a general salary reduction in all other branches of government.

It is well settled that a state constitution cannot limit the Federal Government's power to tax. *Florida v Mellon*,

273 U.S. 12, 17 (1927). See also *Gunn v Dallman*, 171 F. 2d 36, 37 (7th Cir. 1948), in which a state judge contended that Federal taxation of his salary was —

*** a diminution thereof, contrary to Article VI, Section 7 of the Illinois Constitution, Smith-Hurd Stats. The limitation of the State Constitution is upon the state government of Illinois and not upon the federal government. The taxation by the federal government is no violation of the limitation upon the state government not to diminish a judge's salary, even if we concede that taxation is a diminution of salary. ***

And as indicated above, *O'Malley v Woodrough*, *supra*, rejected the contention that imposition of income tax on judicial compensation was a diminution thereof; we see no reason to adopt a different interpretation of the Michigan Constitution. Finally, even assuming *arguendo* that Federal income taxes do constitute a reduction of judicial compensation and that the Michigan Constitution applies to Federal as well as state action, the reduction is a general salary reduction for all Michigan employees, which the Michigan Constitution expressly allows.

Petitioner also argues that contravention of the Michigan Constitution is prohibited by Article IV, Section 4 of the United States Constitution, which provides, in part, that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government ***."

In *Collector v Day*, 78 U.S. (11 Wall.) 113 (1871), the Supreme Court noted that the Constitution guarantees to the states a republican form of government and reasoned that the "means and instrumentalities" employed for

carrying on their governmental operations should not be impaired by the taxing power of the Federal Government. The Court accordingly held that imposition of Federal income taxes upon a state judge's salary was unconstitutional. *Collector v Day* was explicitly overruled, however, in *Graves v New York*, 306 U.S. 466, 486 (1939), insofar as it recognized "an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities." Petitioner's argument under Article IV, Section 4 must therefore fall in view of the overruling of *Collector v Day*. Of course, *Florida v Mellon*, *supra*, requires the same result, though the point is not specifically mentioned by the Court.

Petitioner cites *Collector v Day*, *Indian Motorcycle Co. v United States*, 283 U.S. 570 (1931), and *Commissioner v Stilwell*, 101 F. 2d 588 (7th Cir. 1939), cert. dismissed 307 U.S. 648 (1939), for the proposition that the Federal Government lacks authority to tax instrumentalities, means and operations whereby individual states exert governmental powers. *Indian Motorcycle Co.* and *Stilwell* relied on *Collector v Day* in holding that a sale of motorcycles to a Massachusetts police department and the salary of an Illinois court official were not subject to Federal excise and income taxation, respectively. These cases are without vitality on this point because of the reversal of *Collector v Day* subsequent to the decisions therein. Cf. *Irvine v Spaeth*, 210 Minn. 489, 299 N.W. 204 (1941), appeal dismissed 314 U.S. 575 (1941).

Petitioner also cites *Evans v Gore*, 253 U.S. 245 (1920), which held that Federal taxation of the salary of a United States District Judge did constitute a diminution of his compensation within the meaning of Article III, Section 1 of the United States Constitution. *Evans v Gore* was

overruled by *O'Malley v Woodrough, supra. Oklahoma Tax Commission v United States*, 319 U.S. 598, 610 (1943). *Evans v Gore* accordingly also lacks vitality as a precedent herein.

The same is true of two other cases cited by petitioner which relied on *Evans v Gore*, *O'Donoghue v United States*, 289 U.S. 516 (1933), and *Gordy v Dennis*, 176 Md. 106, 5 A. 2d 69 (1939). Both were decided before *O'Malley v Woodrough*, and both are distinguishable on their facts.

Petitioner emphasizes that "a power over a man's subsistence amounts to a power over his will," Hamilton, *The Federalist* (No. 79), and that judicial independence is essential to our system of government. We agree; however, as the Supreme Court noted in *O'Malley v Woodrough*, at 307 U.S. 282,

To suggest that it makes inroads upon the independence of judges * * * by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering. [Fn. ref. omitted.]

We have considered petitioner's other contentions, and we find them to be unconvincing.

We hold that petitioner may not exclude compensation received as a Michigan Circuit Court Judge from gross income under the United States or Michigan Constitutions.

Decisions will be entered for the respondent.

APPENDIX B

DOCKET ENTRIES

(United States Tax Court)

(Docket No. 2988-72)

William J. Beer and Dora Beer, 2173 Beverly Boulevard, Berkeley, Michigan 48072 — Petitioner vs. Commissioner of Internal Revenue, Respondent.

Appearances for Petitioner: Name: Joseph F. Dillon (Raymond, Fletcher & Dillon). Address: 1400 Guardian Building, Detroit, Michigan 48226

1972

Apr. 27. Petition filed. Fee paid. Apr. 27, 1972, Served May 2, 1972

Apr. 27. Request by Petitioners for trial at Washington, D.C. Action: Granted May 1, 1972. Served May 2, 1972.

June 23. Answer filed by Respondent. Served June 28, 1972.

1973

Nov. 16. Notice for trial on Feb. 19, 1974 at Washington, D.C. Served Nov. 16, 1973.

1974

Jan. 17. Motion by Petitioner to continue case generally from Feb. 19, 1974 Washington, D.C. trial session. Action: Granted Jan. 30, 1974. Served Jan. 31, 1974.

Jan. 18. Notice of filing of Petitioner motion for continuance and hearing on Feb. 6, 1974 at Washington, D.C., if objection filed by January 28, 1974. Served Jan. 18, 1974.

Jan. 28. Notice of no objection to Petitioner motion filed Jan. 17, 1974 filed by Respondent. Served Jan. 31, 1974.

Jan. 28. Motion by Respondent to change the place of trial from Washington, D.C. to Detroit, Michigan.

Jan. 31. Notice of filing of Respondents motion to change place of trial and hearing on March 6, 1974 at Washington, D.C., if objection filed by February 21, 1974. Served Jan. 31, 1974.

Feb. 14. Notice of Objection filed by Petitioner to Respondents motion filed Jan. 28, 1974. Served Feb. 15, 1974.

March 4. Order, that respondents motion filed Jan. 28, 1974 is withdrawn and case is stricken from Mar. 6, 1974 session, at Washington, D.C. Served Mar. 5, 1974.

July 24. Notice of Trial on Oct. 21, 1974 at Washington, D.C. Served July 24, 1974.

Aug. 12. Motion by Petitioner to consolidate docket nos. 2988-72, 8187-73 and 4479-74 for trial, briefing and opinion. Action: Granted. See order dated Sept. 11, 1974.

Aug. 16. Notice of filing of petitioners motion to consolidate and hearing on September 18, 1974 at Washington, D.C., if objection filed by September 5, 1974. Served Aug. 16, 1974.

Aug. 21. Motion by Respondent for Judgment on the Pleadings.

Aug. 21. Brief for the Respondent in support of motion filed Aug. 21, 1974. Served Aug. 26, 1974.

Aug. 23. Order that the Petitioners file a brief in response to Respondents brief in support of his motion for judgment on the pleadings, on or before September 27, 1974. Served Aug. 26, 1974.

Sept. 11. Order, that Petitioner's motion filed Aug. 12, 1974 is Granted and cases are consolidated for Trial, Briefing and opinion and it is Ordered, that cases at #8187-73 and #4479-74 are also sent for trial on October 21, 1974 at Washington, D.C. & further Order, that cases are stricken from the motions session of September 18, 1974 at Washington, D.C. Served Sept. 12, 1974.

Sept. 13. Motion by Petitioner for direction of a hearing on October 21, 1974 at Washington, D.C. on Respondents Motion for judgment on the pleadings; and for an extension of time to Oct. 21, 1974 to file their brief in opposition to Respondents Motion for judgment on the pleadings. Action Granted Sept. 17, 1974. Served Sept. 18, 1974.

- Sept. 18. Notice of filing of Respondents motion for judgment on the pleadings and hearing on October 21, 1974 at Washington, D.C. Served Sept. 18, 1974.
- Oct. 21. Hearing at Washington, D.C. before Judge Wiles. Joint Motion for leave to submit case under Rule 122-filed and granted. Stipulation of Facts with Exhibits filed. Respondents oral motion to withdraw motion for Judgment on pleadings. (See Order) Fully Stipulated Under Rule 122. Petitioners Original Brief Due: December 5, 1974 (See Order 11/7/74) Reply Briefs Due: January 20, 1975. Served Nov. 8, 1974.

SUBMITTED TO JUDGE WILES

1974

- Oct. 21. Order, that Respondents Oral Motion is Granted and Respondents Motion for Judgement on the pleadings filed Aug. 21, 1974 is withdrawn. Served Nov. 8, 1974.
- Oct. 30. Transcript of October 21, 1974 received.
- Nov. 4. Motion by Respondent to withdraw motion for judgment on the pleadings and Motion to have Respondents Brief in Support be made Respondents Original Brief. Action: see ordered dated 11/7/74. Served Nov. 8, 1974.
- Nov. 7. Order that Brief filed August 21, 1974 in 2988-72 is considered the Original Brief in each case. Served Nov. 8, 1974.
- Oct. 30. Transcript of Oct. 21, 1974 received.
- Dec. 2. Motion by Petitioner for extension of time to January 5, 1975 within which to file Brief. Action: Granted Dec. 3, 1974. Served Dec. 3, 1974.

- Dec. 30. Motion by Petitioner for extension of time to Feb. 5, 1975 within which to file Brief. Action: Granted Dec. 31, 1974. Served Dec. 31, 1974.

1975

- Feb. 5. Motion by Petitioner for extension of time to Feb. 20, 1975 within which to file Brief. Action: Granted Feb. 6, 1975. Served Feb. 7, 1975.
- Feb. 21. Brief for Petitioners filed. (P. M. Timely). Served Feb. 25, 1975.
- Feb. 21. Motion by Petitioner for Oral Argument. Action: See Order Feb. 26, 1975.
- Feb. 26. Order that the motion for oral argument filed Feb. 21, 1975 is denied. Served Feb. 26, 1975.
- Mar. 14. Motion by Petitioner for reconsideration of Denial of Order of Feb. 26, 1975. Action: Denied Mar. 17, 1975. Served Mar. 18, 1975.
- Mar. 24. Reply Brief for Respondent filed. (serve per Judge). Served Apr. 28, 1975
- Aug. 18. Opinion filed, Judge Wiles. (Decision will be entered for the Respondent). Served Aug. 18, 1975.
- Aug. 28. Motion by Petitioner for an extension of time to Oct. 17, 1975 to file Motion for reconsideration and/or revision of Opinion filed Aug. 18, 1975. Action: Granted Aug. 29, 1975. Served Sept. 2, 1975.
- Sept. 22. Decision entered, Judge Wiles. Served Sept. 22, 1975.

- Oct. 16. Motion by Petitioner for Reconsideration of Opinion. (Exhibits Attached) Action: Denied. See Order Nov. 3, 1975.
- Oct. 16. Motion by Petitioner to Vacate Decisions. Action: (See Order) Nov. 19, 1975.
- Nov. 3. Order, that Motion filed Oct. 16, 1975 to Reconsider the Opinion including Request for Additional oral argument is Denied. Served Nov. 4, 1974.
- Nov. 19. Order that Petitioners motion to vacate the decision filed Oct. 16, 1975 is Denied. Served Nov. 19, 1975.

APPELLATE PROCEEDING

1976

- Feb. 17. Notice of Appeal to U.S.C.A., 6th Cir., filed by Petitioners. Served Feb. 18, 1976.
- Feb. 18. Notice of Filing with copy of notice of appeal sent to Chief Counsel, Mr. Meade Whitaker. Served Feb. 18, 1976.
- Feb. 18. Notice to parties of assembling and date for transmission of record. Served Feb. 18, 1976.

DOCKET NO. 8187-73

1973

- Nov. 14. Petition filed: Fee paid. Nov. 14, 1973. Served: Nov. 15, 1973.
- Nov. 14. Request by Petitioner for trial at Washington, D.C. Action Granted Nov. 15, 1973. Served: Nov. 15, 1973.

- Dec. 18. Answer by Respondent filed. Served: Dec. 20, 1973.

1974

- Aug. 12. Motion by Petitioner to consolidate docket nos. 2988-72, 8187-73 and 4479-74 for trial, briefing and opinion.
- Aug. 16. Notice of filing of Petitioners motion for consolidation and hearing on Sept. 18, 1974 at Washington, D.C., if objection filed by September 5, 1974. Served: Aug. 16, 1974.
- Sept. 11. Order, that Petitioners motion filed Aug. 12, 1974 is Granted and cases are consolidated for Trial, Briefing and Opinion and it is Order, that cases at #8187-73 and #4479-74 are also set for trial on Oct. 21, 1974 at Wash., D.C. & further Order, that cases are stricken from the motions session of September 18, 1974 at Washington, D.C. Served: Sept. 12, 1974.
- Oct. 21. Hearing at Washington, D.C. before Judge Wiles. Joint Motion for leave to Submit Case under Rule 122 filed — Granted. Respondents motion for leave to file Amendment to Answer; Granted. Respondents Amendment to Answer filed. Stipulation of Facts with exhibits filed. Served: Nov. 8, 1974.
- Oct. 21. Fully Stipulated Under Rule 122. Petitioners Original Brief Due: December 5, 1974 (See Order Dated 11/7/74). Reply Briefs Due: January 20, 1975.

SUBMITTED TO JUDGE WILES

1974

- Nov. 4. Motion by Respondent to withdraw Motion for Judgment on the Pleadings & Motion to have Respondents Brief in Support made Respondents Original Brief. Action: See Order Dated 11/7/74. Served: Nov. 8, 1974.
- Nov. 7. Order that Brief filed August 21, 1974 in 2988-72 is considered the Original Brief in each case. Served: Nov. 8, 1974.
- Oct. 30. Transcript of Oct. 21, 1974 received.
- Dec. 2. Motion by Petitioner for extension of time to January 5, 1975 within which to file Brief. Action: Granted Dec. 3, 1974. Served Dec. 3, 1974.
- Dec. 30. Motion by Petitioner for extension of time to February 5, 1975 within which to file Brief. Action: Granted Dec. 31, 1974. Served: Dec. 31, 1974.

1975

- Feb. 5. Motion by Petitioner for extension of time to Feb. 20, 1975 within which to file Brief. Action: Granted Feb. 6, 1975. Served: Feb. 7, 1975.
- Feb. 21. Brief for Petitioners filed. (P. M. Timely). Served: Feb. 25, 1975.

- Feb. 21. Motion by Petitioners for Oral Argument. Action: See Order Feb. 26, 1975.
- Feb. 26. Order that the motion for oral argument filed Feb. 21, 1975 is denied. Served: Feb. 26, 1975.
- Mar. 14. Motion by Petitioner for reconsideration of Denial of Order of Feb. 26, 1975. Action: Denied Mar. 17, 1975. Served: Mar. 18, 1975.
- Mar. 24. Reply Brief for Respondent filed. (brief served per Judge) Served: Apr. 28, 1975.
- Aug. 18. Opinion filed, Judge Wiles. (Decision will be entered for the Respondent.) Served: Aug. 18, 1975.
- Aug. 28. Motion by Petitioner for an extension of time to Oct. 17, 1975 to file Motion for Reconsideration and/or Revision of Opinion filed Aug. 18, 1975. Action: Granted Aug. 29, 1975. Served: Sept. 2, 1975.
- Sept. 22. Decision entered, Judge Wiles. Served: Sept. 22, 1975.
- Oct. 16. Motion by Petitioner for Reconsideration of Opinion. (Exhibits Attached) Action: Denied See Order 11/3/75.
- Oct. 16. Motion by Petitioner to Vacate Decisions. Action: (See Order) Nov. 19, 1975.
- Nov. 3. Order, that Motion filed Oct. 16, 1975 to Reconsider the Opinion including Request for Additional oral argument is Denied. Served: Nov. 4, 1975.
- Nov. 19. Order that Petitioners motion to vacate the decision filed Oct. 16, 1975 is Denied. Served: Nov. 19, 1975.

APPELLATE PROCEEDINGS

1976

- Feb. 17. Notice of Appeal to U.S.C.A., 6th Cir., filed by Petitioners. Served: Feb. 18, 1976.
- Feb. 18. Notice of Filing with copy of notice of appeal sent to Chief Counsel, Mr. Meade Whitaker. Served: Feb. 18, 1976.
- Feb. 18. Notice to parties of assembling and date for transmission of record. Served: Feb. 18, 1976.

DOCKET NO. 4479-74

1974

- June 24. Petition filed: Fee paid. June 24, 1974. Served: June 25, 1974.
- June 24. Request by Petitioner for trial at Washington, D.C. Action: Granted June 25, 1974. Served: June 25, 1974.
- Aug. 12. Answer by Respondent filed. Served: Aug. 14, 1974.
- Aug. 12. Motion by Petitioner to consolidate docket nos. 2988-72, 8187-73 and 4479-74 for trial, briefing and opinion.
- Aug. 16. Notice of filing of petitioners motion to consolidate and hearing on Sept. 18, 1974 at Washington, D.C., if objection filed by September 5, 1974. Served: Aug. 16, 1974.
- Sept. 11. Order that Petitioners Motion filed Aug. 12, 1974 is Granted and cases are consolidated for Trial,

Briefing and Opinion and it is Order, that cases at #8187-73 and #4479-74 are also set for trial on Oct. 21, 1974 at Washington, D.C. & Further Order, that cases are stricken from the motions session of September 18, 1974 at Washington, D.C. Served: Sept. 12, 1974.

- Oct. 21. Hearing at Washington, D.C. before Judge Wiles Joint Motion for leave to submit case under Rule 122 filed; Granted. Stipulation of facts with attached exhibits filed. Fully stipulated under Rule 122. Petitioners Original Brief Due: December 5, 1974. Reply Briefs Due: January 20, 1975. (Action: See Order 11/7/74) Served: Nov. 8, 1974.

SUBMITTED TO JUDGE WILES

1974

- Nov. 4. Motion by Respondent to withdraw Motion for judgment on the Pleadings and Motion to have Respondents Brief in Support be made Respondents Original Brief. Action: See Order dated 11/7/74. Served: Nov. 8, 1974.
- Nov. 7. Order that brief filed August 21, 1974 in 2988-72 is considered the Original Brief in each case. Served: Nov. 8, 1974.
- Oct. 30. Transcript of Oct. 21, 1974 received.
- Dec. 2. Motion by Petitioner for extension of time to January 5, 1975 within which to file Brief. Action: Granted Dec. 3, 1974. Served: Dec. 3, 1974.
- Dec. 30. Motion by Petitioner for extension of time to Feb. 5, 1975 within which to file Brief. Action: Granted Dec. 31, 1974. Served: Dec. 31, 1974.

1975

- Feb. 5. Motion by Petitioner for extension of time to Feb. 20, 1975 within which to file Brief. Action: Granted Feb. 6, 1975. Served: Feb. 7, 1975.
- Feb. 21. Brief for Petitioners filed. (P. M. Timely) Served: Feb. 25, 1975.
- Feb. 21. Motion by Petitioner for Oral Argument. Action: See Order Feb. 26, 1975.
- Feb. 26. Order that the motion for oral argument filed Feb. 21, 1975 is denied. Served: Feb. 26, 1975.
- Mar. 14. Motion by Petitioner for reconsideration of Denial of Order of Feb. 26, 1975. Action: Denied March 17, 1975. Served: Mar. 18, 1975.
- Mar. 24. Reply Brief for Respondent filed. (serve per judge) Served: Apr. 28, 1975.
- Aug. 18. Opinion filed, Judge Wiles. (Decision will be entered for the Respondent.) Served: Aug. 18, 1975.
- Aug. 28. Motion by Petitioner for extension of time to Oct. 17, 1975 to file Motion for Reconsideration and/or revision of opinion filed Aug. 18, 1975. Action: Granted Aug. 29, 1975. Served: Sept. 2, 1975.
- Sept. 22. Decision entered, Judge Wiles. Served: Sept. 22, 1975.
- Oct. 16. Motion by Petitioner for Reconsideration of Opinion. (Exhibits Attached) Action: Denied See Order 11/3/75.
- Oct. 16. Motion by Petitioner to Vacate Decisions. Action: (See Order) Nov. 19, 1975.

- Nov. 3. Order that Motion filed Oct. 16, 1975 to Reconsider the Opinion including Request for Additional oral argument is denied. Served: Nov. 4, 1975.
- Nov. 19. Order that Petitioners motion to vacate the decision filed Oct. 16, 1975 is Denied. Served: Nov. 19, 1975.

APPELLATE PROCEEDINGS

1976

- Feb. 17. Notice of Appeal to U.S.C.A., 6th Circuit, filed by Petitioners. Served: Feb. 18, 1976.
- Feb. 18. Notice of Filing with copy of notice of appeal sent to Chief Counsel, Mr. Meade Whitaker. Served: Feb. 18, 1976.
- Feb. 18. Notice to parties of assembling and date for transmission of record. Served: Feb. 18, 1976.

APPENDIX C

DECISION

(United States Tax Court)

(Beer, et al., v. Comm. of Internal Revenue)

(Docket No. 2988-72)

(Entered Sept. 22, 1975)

Pursuant to the determination of the Court, as set forth in its Opinion filed August 18, 1975, it is Ordered and Decided: That there is a deficiency in petitioners' income tax for the taxable year 1969 in the amount of \$7,865.02.

Entered: Sept. 22, 1975

/s/ (Darrell D. Wiles), Judge

APPENDIX D**DECISION**

(United States Tax Court)
 (Beer, et al., v. Comm. of Internal Revenue)
 (Docket No. 8187-73)
 (Entered Sept. 22, 1975)

Pursuant to the determination of the Court, as set forth in its Opinion filed August 18, 1975, it is

Ordered and Decided: That there is a deficiency in petitioners' income tax for the taxable year 1971 in the amount of \$13,616.81.

Entered: Sept. 22, 1975.

/s/ Darrell D. Wiles, Judge

(APPENDIX E)**DECISION**

(United States Tax Court)
 (Beer, et al., v. Comm. of Internal Revenue)
 (Docket No. 4479-74)
 (Entered Sept. 22, 1975)

Pursuant to the determination of the Court, as set forth in its Opinion filed August 18, 1975, it is

Ordered and Decided: That there is a deficiency in petitioners' income tax for the taxable year 1970 in the amount of \$7,185.22.

Entered: Sept. 22, 1975.

Darrell D. Wiles, Judge

APPENDIX F**ORDER**

(United States Tax Court)
 (Beer, et al., v. Comm. of Internal Revenue)
 (Docket Nos. 2988-72, 8187-73, 4479-74)
 (November 3, 1975)

On October 16, 1975, counsel for petitioners in the above cases filed a "Motion for Reconsideration of Opinion," with numerous attachments.

After due consideration of this motion and the record in these cases, it is hereby

Ordered: That the aforesaid motion is hereby denied, including petitioners' request for additional oral argument.

Dated: Washington, D.C., November 3, 1975.

/s/ Darrell D. Wiles
 Judge

APPENDIX G**ORDER**

(United States Tax Court)
 (Beer, et al., v. Comm. of Internal Revenue)
 (Docket Nos. 2988-72, 8187-73, 4479-74)
 (November 19, 1975)

Petitioners' motion to reconsider the opinion having been denied by order dated November 3, 1975, it is

Ordered that petitioners' motion to vacate the decision filed October 16, 1975 is denied.

/s/ Darrell D. Wiles
Judge

Dated: Washington, D.C., November 19, 1975

APPENDIX H

ORDER

(United States Court of Appeals for the Sixth Circuit)

(Beer, et al., v. Comm. of Internal Revenue)

(No. 76-1447)

(Filed November 22, 1976)

Before: Edwards, Peck and Lively, Circuit Judges.

This appeal, perfected from an order of the Tax Court denying petitioners-appellants' claims for the redetermination of their income tax liabilities for certain years, has come on for consideration pursuant to Rule 3(e), Rules of the Sixth Circuit. Appellant William J. Beer (his wife Dora Beer is a party because they filed a joint return) contends that because he is a state court judge his judicial salary is exempt from federal income taxation. It appearing to the Court that the appeal is frivolous and entirely without merit, Rule 9, Rules of the Sixth Circuit,

It Is Ordered that this appeal be and it hereby is dismissed.

Entered by Order of the Court

/s/ John P. Hehman, Clerk of Court

APPENDIX I

ORDER

(United States Court of Appeals for the Sixth Circuit)

(Beer, et al., v. Comm. of Internal Revenue)

(No. 76-1447)

(Filed December 28, 1976)

Before: Edwards, Peck and Lively, Circuit Judges.

Petitioner-appellant's petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit,

It Is Ordered that the petition be, and it hereby is denied.

Entered by Order of the Court

/s/ John P. Hehman
Clerk of Court